No. 10,381

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES W. BUTLER, et al.,
Appellants,

vs.

GRACE APPLETON McKEY,
Appellee.

BRIEF FOR APPELLEE.

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INTRODUCTION.

In April, 1939 appellants' San Francisco counsel, for the purpose of procuring an order for publication of summons against appellee, a resident of the Los Angeles district submitted to the judge of the trial Court the affidavit of one of the counsel residing in San Francisco, which recited the purported unsuccessful efforts of a specially hired process-server in Los Angeles, and to a slight degree the efforts of a deputy marshal, to locate and serve appellee defendant. Since neither the process-server nor the deputy marshal supplied any affidavit, the showing was entirely hearsay, with the result that if any part of the

affidavit is false no perjury has been committed. If the process-server, to make his fee look more reasonable, has exaggerated his activity in making the search and endeavoring to serve, it was only poetical license and not perjury. Of course, the affiant, to be entirely honest, had only to paraphrase or quote from letters he received from his two informants.

Appellee charges that the service is void, because the affidavit base for the order for publication was mere hearsay and not legal evidence. In June 1942 appellee for the first time learned that a judgment had been taken against her, and moved to set aside the service, presenting to the trial Court pertinent decisions of California Courts holding that such orders, predicated upon mere hearsay affidavits, and the resultant default judgments are absolutely void for all purposes.

The trial Court supported by the said precedents declared the service and the judgment void and this is plaintiffs' appeal from the order vacating the same.

We shall cover each point raised in appellants' opening brief and in the order therein set out.

I.

ANSWER TO APPELLANTS' ARGUMENT THAT: "THE DISTRICT COURT WAS IN ERROR IN VACATING THE JUDGMENT IN THE ABSENCE OF ANY MOTION TO THAT EFFECT."

(Appellants' Brief, p. 12.)

We can hardly believe that appellants are serious in presenting this point. Are they claiming that because appellee asked more than she received in her motion, that she is entitled to recover nothing on her motion?

Certainly appellants could not have been in doubt, at the hearing, as to the fact that appellee was attacking the judgment as a void judgment, when the motion to dismiss was directed to the Court's lack of jurisdiction and when there was specifically included in the "Notice of Motion" a motion to quash the service of summons on the ground that the affidavit, upon which the order of publication was predicated, was hearsay and therefore not an adequate base for the order for publications of summons.

An adequate answer to appellants' argument is that the judgment being a void one, the Court had the power to set it aside on its own motion, without any intervention by appellee. (See pages 22 to 24 of this brief.)

II.

ANSWER TO APPELLANTS' POINT THAT: "THE DISTRICT COURT HAD NO JURISDICTION TO VACATE THE JUDGMENT, SINCE MORE THAN SIX MONTHS HAD ELAPSED SINCE ITS ENTRY."

(Appellants' Opening Brief, p. 13.)

As appellants state, appellee's motion was made over three years after the default judgment was entered. However, it was filed less than two months after appellee first learned that judgment had been taken against her. (R. 67, 76.)

From the above fact appellants argue that the motion came too late because not brought within the time limit fixed by Rules of Civil Procedure, 55 (c) and 66 (b).

Rule 55 deals with judgments by default—judgments rendered by the failure of a defendant to plead after a legal service of process upon him. A "default judgment" rendered against a defendant who has not been served is not a judgment—or at the best as we shall later demonstrate, it is a *void* judgment—a nullity.

Rule 55 declares "that if a judgment by default has been entered" it for good cause shown may be set aside *in accordance* with Rule 60 (b). Rule 55 does not say, as appellants suggest, that the default and judgment may be set aside "within the period prescribed in Rule 60 (b)."

Rule 60 (b) does more than prescribe a time limit of 6 months after judgment for moving to set aside a

judgment; it gives the grounds as "mistake, inadvertence, surprise or excusable neglect" of the defendant.

The default judgment in the case at bar was absolutely void, because the affidavit upon which the order for publication was based was mere hearsay and did not contain any legal evidence justifying the order. On pages 36-37 we analyze the affidavit and on pages 35-36 we cite the authorities which declare such an order void for all purposes.

It is perfectly obvious that the above referred to rules are not concerned with *void* judgments or judgments upon which the *default* is fictitious, but relate to defaults following a legal service, made under the rules.

Appellants cite no cases interpreting the rules relied upon by them, but—prefacing their citations with the statement that the "six months' period has taken the place of the former rule that to vacate a judgment the motion would have to be made within the same term of Court, so that after the expiration of the six months' period the Court loses its power to set aside its own judgment" (Apps. Br. p. 13)—they cite cases referring to the Court's power or lack of it, after expiration of the term in which judgment was rendered.

We shall briefly discuss appellants' citations for the purpose of showing that in none of them was a "void judgment" involved. Later and on pages 20 to

25 herein we shall call attention to several of an almost endless list of decisions of the U. S. Supreme Court holding that void judgments are nullities and not to be given effect as judgments at any time.

Appellants' citations.

Appellants' first citation is *Reed v. So. Atlantic Steamship Co.,* "Dept. Just. Bull. No. 155 (142)." We were unable to secure a copy of the referred to bulletin, but we did find the case reported in 2 Fed. Rules Decs. 475. It is a decision of a Delaware District Court and involved the power of the Court, "after term", to make an order dismissing an action for failure to prosecute, after the clerk had given the attorneys for the appearing litigants thirty days to bring the case to trial, under threat of dismissal. No question of lack of notice or of validity of the original order was involved. The motion was for relief from the order on the ground it was taken against him through inadvertence, which, under Rule 60(b), must be made within six months of the date of the order.

In *Phillips v. Negley,* 117 U. S. 665, 29 L. Ed. 1013, after the defendant appeared and pleaded a defense on the merits, the case was set for trial before a jury. Defendant did not appear, and a verdict and judgment were rendered against him. The motion to set aside the judgment was based on inadvertence and neglect of the defendant's attorney, so the Court having acquired jurisdiction in defendant's person,

the judgment was a final judgment and not a void judgment. It was held the motion came too late when made after the term.

The opinion of Judge Mathews in *Jackson v. Heiser,* 111 Fed. (2d) 310 (cited on p. 13 of Appellants' Opening Brief), does not concern itself with the point at issue. There process was served in accordance with Rule 4(c) (d) (1), by leaving a copy of the complaint and summons at defendant's residence, "with a person of suitable age residing therein." Defendant did not plead and default judgment was taken. A month later defendant moved to set aside the entry of default and the motion was denied. Thereafter defendant stipulated with plaintiff for a hearing on the value of the property involved (it was a conversion suit), both agreeing that if the value was found to be less than set up in the default judgment, the judgment would be modified accordingly. In five months defendant's trustee in bankruptcy moved to vacate the judgment and set aside the default. The trial Court refused to set aside the judgment; defendant appealed, and the Court of Appeals held that the service was good and affirmed the judgment.

In *Bronson v. Schulten,* 104 U. S. 410, 26 L. Ed. 797, there was involved no question of a void judgment or of lack of legal service of process. On the contrary the case was tried, a verdict rendered and defendant paid the judgment. Seventeen years later on the application of plaintiff the trial Court set

aside the judgment to enable plaintiff to prove some items which he had overlooked in making proof at the trial. The Supreme Court held that the setting aside of this original judgment was error because done after the term and that any way the failure to discover error at the time of the trial was due to plaintiff's own negligence and there was no fact showing justifying the order.

U. S. v. Mayer, 235 U. S. 55, 59 L. Ed. 129, was a criminal case. The motion to set aside the judgment (based on bias of juror and misconduct of the prosecutor) was made after the term. The Court held the motion came too late, and in so holding declared, as did the Court in *Bronson v. Schulten* (supra) that state law could not give such power to Federal Courts.

In an effort to convince the Court that the default judgment rendered in this case, without a valid service of process, is not a void judgment, appellants herein, on page 14 of their brief, cite three decisions of the United States Supreme Court, to the effect that judgments of Federal Courts, even where jurisdiction is lacking, are not absolute nullities, namely:

Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371;

Stoll v. Gottleib, 305 U. S. 165, and

Noble v. Union River Logging Co., 147 U. S. 165.

In the *Chicot* case (supra) the plaintiff offered in evidence, as *"res adjudicata"*, a judgment rendered in another case involving readjustment of the liability

of bonds voted by holders of more than two-thirds of its bonds. The defendant bond holders, in the second case objected to the judgment on the ground that it was a nullity because, after the judgment became final, the Supreme Court in another case held the statute, under which readjustment took place, unconstitutional. The *Supreme Court* held the judgment was not invalidated by the subsequent declaration that the statute was unconstitutional; and declared that the District Court, even though a Court of limited jurisdiction, had

> "authority when parties are brought before them *in accordance with the requirements of due process,* to determine whether or not they have jurisdiction to entertain the cause and for the purpose to construe and apply the statute under which they are asked to act. Their determination of such questions while open to *direct review* may not be assailed collaterally." (Italics ours.)

And the Court emphasized the fact that it was dealing with cases in which there had been *an adversary trial* on the issue of jurisdiction by saying:

> "The court has the authority to pass upon its own jurisdiction and the decree sustaining jurisdiction *against* attack, while open to direct review, is res adjudicata in a *collateral* action."

In *Stoll v. Gottlieb,* 305 U. S. 165, 83 L. Ed. 104, a petition for reorganization of a corporation under Section B of the Bankruptcy Act was filed. Plaintiff, a creditor, was served with notice of the hearing. He

did not appear but *creditors of the same class* as plaintiff appeared and objected to the reorganization, but the Court after a hearing confirmed it. Plaintiff moved to vacate the decree of confirmation on the ground the Court had no jurisdiction to make such a decree. In a subsequent action in a state Court, the bankruptcy decree was pleaded as *res adjudicata,* but the Court held the decree was beyond the Court's jurisdiction.

The Supreme Court, in a decision by Justice Reed, upheld the bankruptcy decree as *"res adjudicata"* but in almost every sentence emphasized the fact that it was so holding because the decree was made following a trial on the merits. Some of the language making that emphasis is as follows:

> "Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant."
>
> * * * * * * *
>
> "After a Federal Court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res adjudicata is made has not the power to inquire again into that jurisdictional fact."

The Court then speaks of "earlier determination on *an actual contest over jurisdiction between the parties",* and then says:

> *"After a party has his day in Court, with opportunity to present his evidence,* and has view of the law, a collateral attack upon the decision there rendered merely retries the issue previously determined." (172)

and that

> "a former judgment in a State Court is conclusive between the parties and their privies in a Federal Court *when entered upon an actual issue as to jurisdiction.*"

And to demonstrate without any question that the Court was giving *"res judicata"* effect to the bankruptcy decision *because* that decision as to jurisdiction was based upon a hearing between the adverse parties, it finally says with reference to a decision in another Court:

> "The decision is inapplicable here because there was not an actually contested issue and order as to jurisdiction. The case is also distinguishable because the motion to vacate was made on the same bankruptcy proceedings as the order."

In the case at bar the trial Court in rendering the default judgment against appellee, did not do so in an adversary proceeding, after a hearing, but rendered a default judgment without any jurisdiction over the person of appellee to support it.

In the third citation, *Noble v. Union River Logging Co.,* 147 U. S. 165, the Supreme Court held that a current Secretary of the Interior had no power to set aside an order of his predecessor in office in granting a right of way over public lands for a logging road, under an act of Congress empowering the Secretary of Interior to do so.

Appellants on page 16 of their brief cite the case, above discussed, as holding that the jurisdictional facts in the present case are merely quasi-jurisdictional and not subject to *collateral attack*. The cases do not so hold. For example, in the decision in the *Noble* case the Supreme Court lists as facts "strictly jurisdictional" and "without which the act of the court is a nullity", the following:

> "the service of process within the state upon the defendant in a common law action"
>
> "A publication in strict accordance with the Statute, where the property of an absent defendant is sought to be charged."

And the Court says as to a decision made without the presence of such facts "is a nullity, and its invalidity may be shown in a collateral proceedings." (173)

III (1).

ANSWER TO APPELLANTS' POINT THAT: "AN ATTACK ON A DEFAULT JUDGMENT MADE AFTER THE EXPIRATION OF 6 MONTHS' PERIOD PRESCRIBED IN THE FEDERAL RULES OF PROCEDURE IS A COLLATERAL ATTACK AND THEREFORE SUBJECT TO THE LIMITATIONS WHICH ARE APPLICABLE TO COLLATERAL ATTACKS.

(See Appellants' Opening Brief, p. 16.)

It is not exactly clear to us why appellants' counsel have given space to this portion of their brief, unless it is to establish that appellee's attack is a collateral one, and from that as a premise argue that we cannot

go beyond the record to establish the invalidity of the order. Such an argument would be a waste of time, for it is our contention that the record, without the aid of any evidence outside of it, shows that the trial Court never acquired jurisdiction of appellee.

However, the fact that appellants place emphasis on Rule 60 (b) of the Rules of Civil Procedure and upon Section 473 of the California Civil Code (the source of Rule 60 (b)), impels us to believe that appellant is here reviewing the earlier argument that appellee's motion is too late because not brought within the time limit of that rule and the Code section. With that point in mind we shall briefly analyze appellants' citations on the point.

In the first place Rule 60 (b) fixes a time limit only as to motions aimed at relieving a party from a default due to his or her "mistake, inadvertence, surprise or excusable neglect". The proceeding here is aimed at no such thing—it seeks to set aside a judgment void because the Court had no jurisdiction of the person of appellee defendant. The rule at its end carries a proviso that it does not limit the power of the Court to "(1) entertain an action to relieve a party from a judgment order or proceedings, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, a judgment obtained against a defendant not actually notified." But that provision has no bearing here either. It simply refers to the right of a defendant, under Section 57 of the Judicial Code (Title 28 U.S.C.A. 118), in an *in rem*

action, who has been served by publication only, to come in and enter his appearance in the action "at any time within one year after final judgment."

Section 473 of the California Code of Civil Procedure is to the same effect as Rule 60 (b). It places a six months' time limit on motions for relief from the applicant's "mistake, inadvertence, surprise or excusable neglect." It also recognizes the right of the Court *to set aside a void judgment without placing any time limit for so doing.* Section 473 (a) places a time limit on permitting a defaulted defendant, who has not been personally served, to answer—one year after rendition of judgment; but it makes no reference to void judgments, which as we shall hereafter show, can be set aside or ignored at any time, because they are nullities—*they are not judgments.*

Appellants' citations.

People v. Norris, 144 Cal. 422 (Appellants' Opening Brief, p. 17), is not at all in point because there the question of the sufficiency of the showing by the defendant was involved, while here we are concerned with the question whether a decree can stand in which the showing is not by affidavit, but by mere hearsay in affidavit form. It will be observed from page 422 of the report of the *Norris* case that the facts were similar to those in the affidavit in *People v. Wrin,* 143 Cal. 11, and were such as to bring the case within the rule laid down in *Rue v. Quinn,* 137 Cal. 651. The affidavits in the *Wrin* case and the *Quinn* case dis-

close the investigation made by the affiant. They contained the same affirmations, probably because in the latter of the two cases the affidavit in the first case was used as a pattern. Each affidavit showed that the affiant made inquiry of every one who might know of defendant's residence, and after diligent search defendant could not be found in the state (143 Cal. 13).

As we have shown, the search in the present case was made by an investigator hired by plaintiffs' counsel, and the "affidavit" merely recites the hearsay statement of the investigator as to what he did, which as was held in *Kahn v. Matthai,* 115 Cal. 689 and *In re Behymer,* 130 Cal. App. 200, 204 (analyzed later herein), was not proof by affidavit, and an order based thereon could not give the Court jurisdiction of the person of the defendant.

In *Irwin v. Scribner,* 18 Cal. 499, and *In re Griffith,* 84 Cal. 107 (Appellants' Br. p. 18), the Court merely held that where a verified probate petition recites residence of the decedent, the order admitting the will to probate cannot be attacked collaterally, because the record shows a *"prima facie"* case and the order therefore is not void. In the case at bar the *record itself* shows the trial Court acquired no jurisdiction.

Associated Oil Co. v. Mullen, 110 Cal. App. 385 (Appellants' Brief, p. 18), goes no further than to hold that a judgment may be attacked collaterally only where the want of jurisdiction appears on the face

of the record (389); but by way of dictum it declares that where (as is the case before the Court) the record shows a lack of jurisdiction, it is *"void upon its face"* and is attackable collaterally as well as directly.

In *Crouch v. Miller & Co.,* 169 Cal. 341 (Appellants' Brief, p. 18), the Court holds that if the record *on its face* shows jurisdiction, the resultant judgment cannot be attacked collaterally.

Appellants quote at considerable length from *Washko v. Stewart,* 44 Cal. App. (2d) 311 (Appellants' Brief, pp. 18-19), apparently with the idea of creating the impression that a motion such as appellee's in this case must be made within the one year time limit of Section 473(a) of the Code of Civil Procedure of California. Section 473(a) has nothing whatever to do with judgments *void upon their face,* as we shall later demonstrate by pertinent citations. Furthermore, the *Washko* case (supra) has nothing to do with a judgment void upon the face of the record. There the record *showed personal service.* It went even farther, it showed that defendant, after his default was taken, appeared and testified at the trial of the case, describing himself as a party, and made the application *specifically* under Section 473, two years after the default.

In *Smith v. Jones,* 174 Cal. 513, and the companion case of *Smith v. Bratman,* 174 Cal. 518 (Appellants' Brief, p. 19), the record of the default judgment showed personal service upon the defendant, and the

Court held that since the judgment was "valid on its face", a motion to set it aside might be made within a reasonable time. The Supreme Court said in the latter case *"a judgment which is not void upon its face,* may not be set aside on motion unless made within a reasonable time" (emphasis ours), thus implying that if the judgment *were void on its face* the motion *did not* have to be made in any particular time.

Since the record in the case at bar *on its face* shows the judgment to be void through lack of the Court's jurisdiction, it makes no difference whether the attack is direct or collateral, and it makes no difference how much time has elapsed since its entry.

Lack of jurisdiction over the person invalidates the judgment.

We think it is apparent that there was no service of process on appellee, in that the order for publication was not in strict or any accordance with the statute, and therefore the entire proceeding, including the default judgment, was a nullity and attackable not only directly as we are attacking it, but even collaterally. We discuss the affidavit on pages 36-37 herein, and the law with reference to it on pages 35-36.

That a personal judgment of a Court is an absolute nullity if the record thereof upon its face discloses that jurisdiction of the person has not been obtained, is elementary. The reports abound in such decisions. For example: In *Earle v. McVeigh,* 91 U.

S. 503, 23 L. Ed. 398, the Supreme Court affirmed an order restraining the enforcement of a default judgment on the ground that through insufficient constructive service the defendant had no notice and the trial Court no jurisdiction. The opinion states that:

> "Standard authorities lay down the rule, that in order to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject-matter; and it is equally clear that the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it, as the *want of jurisdiction makes it utterly void and unavailable for any purposes.* Borden v. Fitch, 15 Johns, 14."

The same Court in *Thompson v. Whitman,* 18 Wall. 457, 21 L. Ed. 897, had earlier said:

> "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, the judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable but simply void."

Some years later the Supreme Court in *Scott v. McNeal,* 154 U. S. 34, 38 L. Ed. 896, quoted, as the law, Justice Field's statement in *Pennoyer v. Neff,* that:

> "The words 'due process of law' when applied to judicial proceedings mean a cause of legal

proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance." Pennoyer v. Neff, 95 U. S. 714, 733.

A more specific statement of the rule is found in the opinion in *Harris v. Hardeman,* 14 Howard 333, 14 L. Ed. 444, viz.:

"* * * it would seem to be a legal truism, too palpable to be elucidated by argument, that no person can be bound by a judgment, or any proceeding conducive thereto, to which he never was party or privy; that no person can be in default with respect to that which it never was incumbent upon him to fulfill. The court entering such judgment by default could have no such jurisdiction over the person as to render such personal judgment, unless, by summons, or other process, the person was legally before it. * * * it has been settled, that a judgment depending upon proceedings in personam can have no force as to one on whom there has been no service of process, actual or constructive; who has had no day in court, and no notice of any proceeding against him. That with respect to such a person, such judgment is absolutely void; he is no party

to it, and can no more be regarded as a party than can any and every other member of the community."

See to the same effect:

Old Wayne Mut. L. Assoc. v. McDonough, 204 U. S. 8, 17, 51 L. Ed. 345, 349.

A void judgment may be attacked at any time and in any manner.

If a judgment is *void* because made by a Court lacking jurisdiction, and the defendant has never had his day in Court, it would seem obvious that it could be attacked at any time whether during or after term; within six months or after six months from its entry.

Cases so holding are as follows:

Simonds v. Norwich Union Indemnity Co. (8th C.C.A.), 73 Fed. (2d) 412;

City of Stuart v. Green (5th C.C.A.), 91 Fed. (2d) 603, 604 (Cert. denied by Supreme Ct., 294 U. S. 711);

United States v. Turner (8th C.C.A.), 47 Fed. (2d) 86, 88;

Woods Bros. v. Yanktown Construction Co. (8th C.C.A.), 54 Fed. (2d) 304, 307;

Electro Therapy Products Co. v. Strong (9th C.C.A.), 84 Fed. (2d) 766.

In *Simonds v. Norwich Union Indemnity Co.* (supra) the Court of Appeals of the Eighth Circuit when considering the rights of a trial Court to col-

laterally impeach the record of a District Court, commented that,

> "Of course, a court has inherent power, even after the expiration of the term, by proper order to correct clerical and inadvertent errors of judgment, plainly apparent in the record; *and a judgment showing itself upon its face to be a nullity, may be vacated at any time.*" Citing Woods Construction Co. v. Yanktown County, 54 Fed. (2d) 304. (415)

The same Court in the earlier case of *Woods Bros. v. Yanktown* (supra), very thoroughly considered the question of the power of a trial Court to set aside judgments which were void upon their face because of lack of jurisdiction. The Court there said:

> "There are exceptions to the rule that a court cannot vacate a judgment after the term expires, etc., one of which is that where *upon its face* it is apparent that the judgment is a nullity the court may vacate it at any time. The oft-quoted case of People v. Greene, 74 Cal. 400, 16 P. 197, 199, 5 Am. St. Rep. 448, refers to such judgments as 'a dead limb upon the judicial tree.' "

It then quoted from *Mellon v. St. Louis Union Trust Co., et al.,* 240 Fed. 359, 361, as follows:

> "* * * 'if that part of the decree was absolutely void and therefore subject to collateral attack, the court has the power to set it aside at any time, even after the expiration of the term.' "

In *United States v. Turner,* 47 Fed. (2d) 86, 88 (8th C.C.A.), the plaintiff sued the United States without its consent. The United States District Attorney answered. In the next term of Court the government moved to vacate the decree on the ground that there was a lack of jurisdiction because the United States had not consented to be sued. The trial Court refused to vacate the decree and the lack of jurisdiction appearing on the face of the record, the Court of Appeals revised the case ordering the decree vacated saying with reference to the power of the Court to set aside the decree after the term:

> "A court has the inherent power to vacate its judgment or decrees which are rendered without jurisdiction, upon motion made either at the term at which the judgment is rendered or afterwards." Citing Pollitz v. Wabash R. Co., 180 Fed. 950; Harris v. Hardeman, 14 How. 334, 14 L. Ed. 444; In re Demmitt (C.C.A.), 221 Fed. 350; Freeman on Judgments §98; 38 Corpus Juris, 214, and other authorities.

The Court then quoted from Freeman on Judgments, Vol. 1, Sec. 117, as follows:

> "* * * The first and most material inquiry in relation to a judgment or decree, then, is in reference to its validity. For if it be null, no action upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government, can invest it with any of the ele-

ments of power or of vitality. It does not terminate or discontinue the action in which it is entered, nor merge the cause of action; and it therefore cannot prevent the plaintiff from proceeding to obtain a valid judgment upon the same cause, either in the action in which the void judgment was entered, or in some other action."

The Court of Appeals of the Fifth Circuit in *City of Stuart v. Green,* 91 Fed. (2d) 693, ordered the setting aside of a decree on the ground that the trial Court lacked jurisdiction of the action, *after* the case had passed through an earlier appeal in which the question of jurisdiction was not raised.

California cases holding motion to set aside void judgments can be made at any time.

In view of the fact that appellants have accepted the decisions of our state Courts, because of the analogy of Section 473 of the Code of Civil Procedure to Rule 60(b) of The Federal Rules of Civil Procedure, we shall take the liberty of calling attention to a few California decisions which directly hold that a judgment void upon its face (as we trust we have demonstrated or will demonstrate is the case here), can be attacked at any time.

The California Supreme Court in *Estate of Smead,* 12 Cal. (2d) 20 at 25, says with reference to judgments void upon the face of the record:

"If the fatal defect is apparent from an inspection of the judgment roll it may be urged

> upon either direct or collateral attack, and the asserted void portions may be lopped off as dead branches upon the judicial tree."

The District Court of Appeal of the Second District of California, in *Michel v. Williams,* 13 Cal. App. (2d) 198, uses the identical language just above quoted, and also declares that

> "The Court has power to vacate an order, *void upon its face, at any time* upon its own motion or upon motion of a party." (Emphasis ours.)

In *Estate of Pusey,* 180 Cal. 368, 374, the heirs of a decedent contested a will on the ground that it had been revoked by decedent's marriage subsequent to the execution of the will. The proponents countered with the claim that there was no valid subsequent marriage because the decree of divorce obtained by decedent, against the wife to whom he was married at the time the will was made, was void because the affidavit upon which the order for publication of summons was based failed to aver that due diligence had been employed to locate the defendant, etc.

The contestants objected to the attack on the divorce decree on the ground of laches and the statute of limitations.

But the Supreme Court disposed of the point decisively; determined it by holding that laches did not enter into the case because (quoting from an earlier decision):

> "A judgment absolutely void may be attacked anywhere, directly or collaterally whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right whatever." (Citing cases.)

The above decision was cited with approval in *Garrison v. Blanchard,* 127 Cal. App. 616, 620, in support of the statement: "Neither the doctrine of laches nor the bar of the statute of limitation has any application to a collateral attack upon a judgment void because of want of jurisdiction." The Court also said that:

> "As the judgment was void, the motion was properly granted, since there is no time limiting a collateral attack on a void judgment." (621)

The rule was similarly stated in *Scoville v. Keglor,* 29 Cal. App. (2d) 66, 67, in the following sentence:

> "It is undoubtedly true that when it appears on the face of the record that a judgment is without, or in excess of the jurisdiction of the court rendering it, the judgment may be collaterally attacked at any time." (Citing Harlan v. Harlan, 154 Cal. 341, Lieberman v. Superior Court, 72 Cal. App. 18, and Johnson v. Superior Court, 128 Cal. App. 584.)

ANSWER TO APPELLANTS' POINT III (2) THAT: "DEFECTS IN AN AFFIDAVIT FOR THE PUBLICATION OF SUMMONS WHICH CONCERN THE MODE OF PROOF DO NOT MAKE THE JUDGMENT SUBJECT TO COLLATERAL ATTACK."

(Appellants' Brief, p. 20.)

Appellants start this part of their argument with a faulty premise—that the affidavit herein is being attacked because it contains defects. Such is not the case—we say that it is not an affidavit as that word is used in the statute involved.

Since appellee was never personally served, jurisdiction over her is dependent upon a valid constructive service—by publication. Congress through its expressly authorized agent, the United States Supreme Court, has declared that the state statute with reference to publication of summons shall be the medium through which the District Court of the United States shall acquire jurisdiction.

Rule 4(d)(7), Rules of Civil Procedure (28 U.S. C.A. 723c), provides that summons and complaint in a civil suit may be served in the manner prescribed by any statute of the United States, or

> "in the manner prescribed by the law of the State in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the Courts of general jurisdiction of that State."

As there is no Federal statute providing for service by publication, as was attempted here, one must look to California law, Section 412, Code of Civil Procedure, which reads in part as follows:

> "Where the person on whom service is to be made * * * cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons * * * and the fact appears by affidavit to the satisfaction of the court; and it also appears by affidavit or by the verified complaint on file, that a cause of action exists against the defendant * * * such court * * * may make an order that service be made by the publication of summons. * * *"

The Court having selected "the law of the state", as the method of securing jurisdiction over the person of a defendant in such an action as this, where service is to be by publication, we must look to the California Code section and its interpretation by the Courts of this State to determine whether jurisdiction was in fact obtained. It will be observed that appellants in their argument under this head, "fight shy" of California citations and, as we shall in a moment show, rely upon two United States Supreme Court decisions interpreting statutes and laws of other states.

Strict construction rule applies.

Since service by publication if properly carried out may result in a judgment against a defendant who has no suspicion that he or she has been served, and since such a service is in derogation of the common law, the Courts of California have consistently declared that the Code sections with reference to substituted service must be *strictly construed.* And that is

particularly just as to those cases where the published notice is in a "legal" newspaper, as in the case here (R. 61), for no surer method of concealing a notice directed to a layman could be found.

The following cases hold that unless the requirements of the code section are strictly followed, the Court does not acquire any jurisdiction over the defendant and the resultant default judgment is void.

Rickeston v. Richardson, 26 Cal. 149, 152;
Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445, 446;
Braley v. Seaman, 30 Cal. 610, 616;
Gage v. Riverside, 156 Fed. 1002, 1004.

In *Rickeston v. Richardson* (supra) the California Supreme Court speaking of the sections of the Practice Act whence came our present Section 412 of the Code of Civil Procedure, said:

> "Those sections are in derogation of the common law, and must be strictly construed *in order to give the Court jurisdiction* over the person of the defendant. A failure to comply with the rule there prescribed in any particular is fatal where it is not cured by appearance." (Italics ours.)

The Court then finds that an affidavit, which merely states in the language of the statute the ultimate fact that the defendant after due diligence cannot be found within the state, does not furnish evidence of the fact as contemplated by the code section, and does not confer any jurisdiction for the order of publication;

and finally the Court says that unless the proceeding are carefully scrutinized the code section

> "may lead to gross abuses and the rights of persons and property made to depend upon the elastic conscience of interested parties, rather than the enlightened judgment of a court or judge."

The same Court in *Columbia Screw Co. v. Warner Lock Co.* (supra) expressed the rule of strict construction of the code section, citing the *Rickeston* case (supra) as a precedent; revised the judgment because of the insufficiency of the affidavit, upon which the order for publication was based, and declared that:

> "When the statute uses the words 'appears by affidavit' it means more than an affidavit as to what some one told the party making the affidavit,"

and finally held that:

> "The statutory basis for the order *must appear of record,* or the order is void,"

and that

> "If the Court had no jurisdiction of the person of defendant should not be enforced in any manner." (449) (Emphasis ours.)

Braley v. Seaman (supra) is likewise authority for strict construction of the statute as to the affidavit, and holds that where the section is not strictly followed, the resultant judgment is *void.*

Judge Wellborn in *Gage v. Riverside* (supra) emphasized the rule of strict construction of statutes

providing for substituted service, citing and quoting from among other decisions that of the Supreme Court of the United States in *Galpin v. Page,* 85 U. S. 350, 21 L. Ed. 959. (1005)

Appellants' citations analyzed.

In view of the facts that California law is expressly made applicable and that, as we have shown, under California law, an order based upon a hearsay affidavit is void, it is hard to see how interpretation of the laws of other states can be of any help to this Court in this case.

However, since appellants have cited several decisions in support of its argument on the point we shall take time and space to analyze those decisions.

In *Pennoyer v. Neff,* 95 U. S. 714, 24 L. Ed. 565 (Apps. Br. p. 20), plaintiff sued to recover possession of land, and defendant for possession relied upon a sheriff's deed secured at a sale following execution of a personal judgment against plaintiff, who was a non-resident and had been served by publication without any attachment upon property in the state in which the judgment was rendered. Plaintiff objected that the judgment was void because he was not personally served in the action in which it was rendered. The trial Court held that the judgment was void under this collateral attack, because the affidavit *for* order for publication of summons and the affidavit of publication contained *defects.* The Supreme Court rejected the trial Court's reasons for ignoring the earlier

judgment, but itself decided that the judgment was void because the process was not personally served and no jurisdiction over the defendant was ever obtained.

While as the Court stated (as quoted on Apps. Br. pp. 20-21), there was a difference of opinion in the Court as to whether a default judgment could be attacked collaterally because of defects in the affidavits. There is nothing in the opinion in *Pennoyer v. Neff* which indicates the character of the *"defects"* in the affidavit—*certainly nothing to indicate that it was attacked because it contained no competent evidence and was mere hearsay.*

Furthermore the case arose under the laws of Oregon and the Supreme Court was interpreting Oregon law in the light of decisions of Oregon Courts. Incidentally the *Pennoyer* decision contains language which emphasizes the need for strict interpretation—viz.:

> "If, without personal service, judgments *in personam,* obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. * * *"

The Supreme Court, in *Thompson v. Thompson,* 226 U. S. 551, 57 L. Ed. 347 (Apps. Br. pp. 22-23) was dealing with the decision of a Virginia Court and the

interpretation of a Virginia statute with reference to the affidavit for publication of summons. The Virginia judgment was offered as *"res judicata"*, in a trial between the same parties in the Supreme Court of the District of Columbia. The affidavit merely stated on information and belief that the defendant "is not a resident of said state, as the (affiant) is informed and verily believes".

The Supreme Court (as under the circumstances it was compelled to) looked to the laws of Virginia for guidance. The decision calls attention to the fact that the Virginia Court considered the affidavit sufficient, when it rendered its judgment; and that the Court (the Supreme Court) was not "referred to any provision of the Virginia Code, nor to any decision of the Courts of that state, that excludes the use of such evidence for such purpose". It also called attention to two Virginia Code provisions expressly permitting information and belief affidavits.

True, the Court does, by way of obiter, make the remark, quoted on page 23 of appellants' brief, to the effect that a defect in an affidavit for publication of summons does not invalidate the order. However, it cites, as its authority for its statement, four state decisions. Had the Court's attention been called to the California cases of *Kahn v. Matthai* and *In re* Behymer, discussed by us on pages 34 to 36 of this brief, it would have had to admit that such was not the law in California. That the Supreme Court considered the state law paramount is evidenced by the

following language appearing toward the end of the decision (226 U. S. 566, 57 L. Ed. 353):

> "* * * The affidavit in question set forth the fact; the circumstance that it was averred on information and belief affected merely the degree of proof. **In the absence of any local law excluding the use of such an affidavit,** the decision of the state court accepting it as legal evidence must be deemed sufficient, on collateral attack, to confer jurisdiction in that court over the subject-matter, in accordance with local laws." (Emphasis ours.)

That the Federal Courts are bound by a state's interpretation of her own laws, where the state law applies, is elementary. We cite but one decision, that of *Brooks v. Burlington R. R.,* 101 U. S. 443, 25 L. Ed. 1057, 1061 (at end of opinion), in which the Supreme Court acknowledged that where an Iowa statute was to be interpreted, the Supreme Court was compelled to follow the Iowa Court's decision, although at variance with a former decision of its own.

There are three other citations in this section of appellants' brief, namely: *Florida Co. v. Schulte,* 103 U. S. 118; *Union P. R. Co. v. Mason City R. Co.,* 199 U. S. 160, and *U. S. v. Title Ins. & Trust Co.,* 265 U. S. 472, but they do not require any analysis as they merely hold that where a decision is rendered on two grounds the decision is considered as made upon each thereof.

A "hearsay affidavit" is not in compliance with the code section.

An affidavit which merely recites what someone told the affiant is not evidence, except as to the fact that the informant did so state to the affiant. The California Code section (Sec. 412, C. C. P.) requires that the fact that the defendant "cannot after due diligence be found within the state", or that the defendant "conceals himself to avoid service of summons", must *"appear by affidavit"*.

Obviously hearsay evidence was not contemplated, for a hearsay affidavit, if false, could not constitute perjury as to the facts therein stated with reference to the diligence of search etc—for the affiant would merely be relaying what someone else told him, and his informant could not be guilty of perjury because his statement would not be under oath.

So we find the *California Supreme Court* to which we must look for interpretation of the state statute, declaring that a hearsay affidavit is not a compliance with the statute and cannot form the foundation for a valid order for publication of summons.

In the case of *Kahn v. Matthai,* 115 Cal. 689, that Court rejected, as a foundation for an order for publication of summons, an affidavit based upon hearsay. There the affidavit which was made by the plaintiff (to quote the Court):

> "states in substance that plaintiff's attorney placed the summons and complaint in the hands

of five different persons (naming them) for service, and that they returned them with the information that they could not find defendant or see her and that she cannot be found in the City or County".

The Court characterized that affidavit as

"but hearsay and may be wholly untrue without any impeachment of the truthfulness of the affiant".

It then declared that

"We are of the opinion the affidavit was insufficient to uphold the order of publication of summons and hence that the Court below failed to obtain jurisdiction of the person of the defendant."

In the case of *In Re Behymer,* 130 Cal. App. 200-204, the order for publication of summons was based upon another affidavit that closely resembled Herrington's affidavit in this case, and the affidavit of the just-discussed *Kahn* case; the Court adopted as the test of the sufficiency of an affidavit, the question

"whether it is so clear and certain that an indictment for perjury may be sustained if it is false". (p. 203.)

The affidavit in that case first declares that affiant employed one William D. McClafler of Los Angeles

"to ascertain the whereabouts of any of the defendants and is informed by him that he could

> not find any of the officers of defendant and was informed that said corporation had defaulted its charter, and was not now in existence; that he had interviewed the City Assessor, Tax Collector and City Clerk of Long Beach, California, where said corporation had its principal office, and at the Alamitos Land Co. who owns property near the lot and could not learn from any of them the whereabouts of any of said defendants".

The Court held the affidavit "insufficient" because every averment with reference to showing diligence was based upon information obtained from another, and, even if false, affiant could not be criminally liable for perjury. (204)

The affidavit in this case is hearsay and therefore inadequate to give Court jurisdiction.

The affidavit upon which the order for publication of summons was predicated will be found on pages 46 to 59 of the record. It was signed by one of appellants' (plaintiffs') counsel and is made up entirely of hearsay. It recites that he was advised by New York lawyers of a former address of defendant (R. 47); that he received other information by letter from the United States Marshal (R. 47); that he carried on a long correspondence with a process server in Los Angeles, named Gold, whom he had hired. Page after page of the affidavit recites what process server Gold wrote to the affiant. (R. 47-56.)

It is true that on page 57 of the record—after ten pages of describing what the Marshal and Gold told

affiant they had done, and after stating (R. 56) that *"In view of the foregoing* (which refers to hearsay statement of the Marshal and Gold) affiant and *plaintiffs' attorneys have decided it would be futile to spend further time,* effort and money in an attempt to effect personal service on said defendant", affiant does say "Defendant cannot, after due diligence, be found within the State of California, and cannot be personally served with process" and that "affiant and plaintiffs' attorneys have made a diligent search for said defendant".

But as was held in *Rickeston v. Richardson,* 26 Cal. 149, 153 (cited elsewhere herein): "It was not sufficient to state generally, that after due diligence the defendant cannot be found within the state * * * but the acts constituting due diligence * * * should be stated". Furthermore the above quoted statement from the affidavit (R. 56-57) discloses that the hearsay details constituted the "search" by affiant.

We do not believe an affidavit could be found in the books more afflicted with hearsay. The affidavit which the Supreme Court found insufficient in *Kahn v. Matthai,* 115 Cal. 689, 692, is quite similar, in that the diligence therein alleged was the diligence revealed in information obtained from five different persons, whom plaintiffs had employed to make service. In *In Re Behymer,* 130 Cal. App. 200, the hearsay information reported in the affidavit was from but one process server.

ANSWER TO APPELLANTS' POINT THAT: "(3) PLAINTIFFS HAVE THE RIGHT AT ANY TIME TO AMEND THE PROOF OF FACTS SUBMITTED FOR AN ORDER OF PUBLICATION."

(Appellants' Brief, pp. 25-31.)

Appellants, apparently realizing that the affidavit of Herrington for the order for publication of summons was insufficient, because hearsay, sought to save the default judgment by seeking leave of the trial Court to amend their showing by filing affidavits of Herrington's purported informants, the process-server Gold and the Deputy United States Marshal. The trial Court denied the right to file the affidavits.

As such a motion was necessarily addressed to the discretion of the trial Court there certainly was no error in the denial of appellants' motion.

Since the proof by affidavit based on direct evidence, rather than hearsay, was a necessary step toward giving the Court jurisdiction, it would be strange indeed if, after the default, the showing could be amplified to give jurisdiction *"nunc pro tunc"*.

It would be just as reasonable to say that if a process-server served some papers other than a summons and complaint upon defendant, and a default were taken on his affidavit of service, the judgment could be validated by *thereafter* serving the defendant with the summons and complaint.

Since, as we have shown, the order of publication was void, and appellee was under no obligation to defend in the action, to even (if she had known of this

See Penoyer v. Neff, 95 U.S. 714;
Jackson vs. Dolan, 58 Cal App. 372.

publication) permit an amendment to the affidavit showing, for the order of publication, would be greatly to the prejudice of appellee, because it would deny her the right to plead.

Not a single citation by appellants under this head had to do with an amendment as to matter going to the jurisdiction of the Court over the person of the defendant, but, on the contrary, every case cited deals with proceedings after jurisdiction has been obtained and under circumstances which did not prejudice the defendants.

Analysis of appellants' citations.

In *City of Salinas v. Lee,* 217 Cal. 252 (Apps. Br., p. 26), publication of summons had been regularly ordered, and publication of the summons for the prescribed period had been carried out, and jurisdiction over the person obtained. Through error the affidavit of publication failed to show the entire period of publication, and the Court permitted an amendment of the proof of publication.

In *Bley v. Dessin,* 31 Cal. App. (2d) 338 (Apps. Br. p. 26), jurisdiction was obtained by personal service of summons and complaint, and the parties appeared by demurrer. An amended complaint was filed and default judgment taken. Some question was raised as to the form of the affidavit of service and plaintiff was permitted to amend the proof of service.

In *In re Speirs,* 32 Cal. App. (2d) 124 (Apps. Br. p. 26) there was actual personal service and an error

in proof of service was corrected by amendment on the ground that "jurisdiction does not depend on proof of service but upon fact of service."

In *Alpha Stores v. You Bet Mg. Co.,* 18 Cal. App. (2d) 252, plaintiff was allowed to amend a return of a writ of attachment, which of course was after jurisdiction attached.

In *Herman v. Santee,* 103 Cal. 519 (Apps. Br. p. 26) personal service was made by a citizen of the United States over the age of eighteen years, and default taken. Defendant moved to set aside the default on the ground that the affidavit of service failed to show the server was over eighteen years of age and the Court held that an amendment to show the server was of age was permissible.

In *Allison v. Thomas,* 72 Cal. 562 (Apps. Br. p. 28) defendant was personally served with summons, and complaint and default judgment taken. Defendant later attacked the judgment on the ground that the affidavit of service failed to reveal that a copy of the complaint had been handed defendant. Plaintiff was permitted to amend his proof of service to cover the situation.

Appellants, on page 30 of their brief, concede that on their motion to amend they rely on *Rule 4(h) of The Rules of Civil Procedure,* which section reads:

> "At any time in its discretion * * * the court may allow any process or proof of service to be amended, unless it appears that material prejudice would result to the substantial rights of the party against whom the process issued."

But the amendment they sought *was not for an amendment to process or proof of service.* If it had been such, the Court, by its exercise of discretion denied the motion. To have granted the motion would have (if within the Court's power, which it was not) resulted in prejudice to the substantial rights of appellee by creating a valid judgment out of a void one, without giving appellee the opportunity of pleading.

Appellants refer in the same connection to 28 U.S.C.A., Sections 767, 777, but they too deal only with amendments to *process,* and even then only where no prejudice is suffered thereby by defendant.

On page 30 of their brief, appellants cite two Federal trial Court decisions, *Erstein v. Rothchild,* 22 Fed. 61, and *Booth v. Denike,* 65 Fed. 43, each of which is concerned with amendments to attachment proceedings. That the amendments were allowed in those cases because jurisdiction had already been obtained, is clearly shown in the former decision by the following language:

> "In the federal courts there must be jurisdiction over the person of the defendant and of a subject-matter, independent of the proceeding in attachment, and without which no attachment can be effectual. Everything pertaining to the attachment, therefore, arises and occurs in the course and progress of a pending suit, and is a mere matter of procedure in the exercise of a jurisdiction otherwise acquired. Any irregularity, omission, or defect, therefore, in that proceeding is

> mere error, and does not and cannot affect the jurisdiction of the court; for that is acquired over his person by process served upon the defendant, and over his property attached by the actual seizure under the writ of attachment."

In *Mexican Central Ry. Co. v. Duthie,* 189 U. S. 76, 47 L. Ed. 715, plaintiff Duthie alleged residence in Texas but failed to allege the fact that he was a citizen of Texas and the United States. After verdict and judgment were rendered in his favor, he sought the right to and was allowed to amend his pleading to allege citizenship.

Appellants close their argument on this point with a quotation from *Dobie on Federal Procedure,* 1st Ed. p. 598, with relation to the power of Courts to permit amendments of writs, processes and pleadings.

But we are not here dealing with a proposed amendment of process.

ANSWER TO APPELLANTS' POINT THAT: "(4) IN A COLLATERAL ATTACK THE RECITALS OF THE JUDGMENT ARE BINDING AND CONCLUSIVE AS TO THE FACT OF SERVICE."

(Appellants' Brief, pp. 31-34.)

Appellants' first citation under this head shows how far afield its argument upon this point goes. As to the case at bar,—as we have shown heretofore, under the California statute with reference to the foundation for constructive service, the requirement as to the affi-

davit for an order for publication of summons is jurisdictional.

In *Ballard v. Hunter,* 204 U. S. 241, 51 L. Ed. 461, sufficiency of the proof of publication alone was involved, and the Court said:

> "The act under which the proceedings were instituted does not require a warning order to be entered of record or on the complaint, and if it had the proceedings could not be attacked collaterally *unless such entry was made jurisdictional, as it was in Gregory v. Bartlett, 55 Ark. 30, and it was not in this case.*"

The answer to that is that under California law the requirement as to the affidavit, which precedes an order for publication, *are made jurisdictional.*

In *Kaufman v. California Mining Synd.,* 16 Cal. (2d) 90, a *true collateral* attack was made upon a judgment in another case, in which the service was attempted (1) by publication, (2) by service upon the Secretary of State, and (3) by attachment. The Court held that the recitals of service in the judgment were conclusive in a collateral attack, where it does not affirmatively appear in the record that the findings of due service were predicated upon any particular document or evidence.

The opinion mentions that the judgment was safe from collateral attack even though there may have been "defects in some of the documents constituting part of the judgment roll and relating to the service

of summons." Incidentally, the Court was forced to concede in that case that, if the invalidity of the order appears on the face of the record, the order is void; for the opinion states that a *collateral attack* "must fail *unless* the invalidity of that judgment affirmatively appears upon the face of the judgment roll."

We are dealing with the sufficiency of the proof *upon which the order for publication was based,* and the Code (C. C. P., Sec. 412) prescribes proof by *affidavit only.* That such is the intention of the statute is also demonstrated by the fact that under Section 670, California Code of Civil Procedure, the judgment roll "in case the service so made is by publication" shall contain *"the affidavit for publication of summons and the order directing the publication of summons."*

Even a sheriff's return cannot be considered, unless in affidavit form. It was directly so held in *Grigsby v. Wopschall,* 127 N. W. 605.

The *Kaufman* case deals only with proof of service of summons.

Musser v. Fitting, 26 Cal. App. 746 (Appellants' brief, p. 33), is not at all in point, because there the Court was dealing with the service of summons, and not with the affidavit required by Section 412 of the Code of Civil Procedure. The point was raised, by way of a collateral attack in another action. The Court held that the recital of due service must be taken as true, "unless the record affirmatively shows

the facts upon which it is based to be untrue" (751), and the Court comments that there might have been other proof of service of an admission of service (751).

In the case at bar, the default judgment is by the clerk and is based upon an affidavit of Harrington that service was by publication pursuant to the Court's order of January 16, 1939, and that affidavit is a part of the record. (R. 65-66)

The long quotation taking up all of page 34 of appellant's brief, is from *City of Salinas v. Lee,* 217 Cal. 255. There the Court was dealing with the sufficiency of an affidavit of publication—the actual service. The Court in its opinion calls attention to the recital of due service, and comments that it did not appeal from the record that "said recital was at all based upon the original and deficient affidavit". (256)

But with the reference to the showing *for the order for publication,*—with which we are here involved—the proof *must be by affidavit and the judgment roll must contain the affidavit, which it does.* (C.C.P., Secs. 412 and 670.)

ANSWER TO APPELLANTS' POINT THAT: "(5) HERRINGTON'S AFFIDAVIT WAS SUFFICIENT UNDER CALIFORNIA PRACTICE TO SUSTAIN THE ORDER FOR PUBLICATION OF SUMMONS."

(Appellants' Brief, p. 35.)

The burden of appellants' argument under this head is that if there was any evidence in the affidavit, even though not at all conclusive, the trial Court had a right to pass on the sufficiency of the affidavit and that if it was wrong, appeal was the only remedy.

Appellants' citations.

Their main reliance is the decision in *Forbes v. Hyde,* 31 Cal. 342, which is cited as authority for the proposition that if the affidavit has any evidence in it, the order is not *void* and can be attacked only by appeal. However, a careful reading of that case destroys appellants' argument.

It will be borne in mind that the cases of *Kahn v. Matthai,* 115 Cal. 689 and *In re Behymer,* 130 Cal. App. 200, heretofore cited and discussed by us, are directly in point, and declare that an affidavit based upon hearsay is not legal evidence, and an order based thereon is absolutely void and subject to attack anywhere and at any time.

Forbes v. Hyde, supra, while not directly in point, contains language which clearly supports the latter (in point of time) cases just cited. Throughout the decision the Court emphasizes the fact that the affidavit made to obtain an order for publication must contain *"legal evidence,"* and that if this legal evi-

dence does not appear in the affidavit, the order is void. The Court also held that:

> "A judgment absolutely void upon its face may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither the basis nor evidence of any right whatever. A judgment against a party over whose person the court has not acquired jurisdiction is void for want of jurisdiction." (347)

The quotation from that opinion contained on page 35 of appellants' brief, emphasizes the fact that the order, to be valid, must be based upon, as it states, "appreciable evidence of a legal character," and again the Court mentions that the proof has to have a "legal tendency to make out a proper case, in all its parts, for issuing the process." And again on page 350 of the report,

> *"The fact must appear by affidavit before jurisdiction to make the order attaches.* That is to say, there must be an affidavit containing a statement of some fact which would be legal evidence, having some appreciable tendency to make the jurisdictional fact appear, for the judge to act upon before he has any jurisdiction to make the order."

The Court then goes on to say:

> "That without such evidence, the proceedings are void, but that if the affidavit presents *legal evidence* which has an appreciable tendency to prove every material jurisdictional fact the order is not subject to collateral attack."

On page 353 of the report, it is said with emphasis that jurisdiction must appear by affidavit.

Finally the Court says:

> "The application for the order is made ex parte, the defendant is not heard, and has no opportunity to object to the kind of proof offered. He thereby waives nothing by failure to object, and it behooves those who are seeking to acquire jurisdiction over him to see that they represent *legal testimony* which tends in some degree to establish the essential jurisdictional facts." (355) (All emphasis ours.)

There are three other citations by counsel under this head:

City of Salinas v. Lee, 217 Cal. 252;
Ligare v. California S. R. R. Co., 76 Cal. 610;
Rue v. Quinn, 137 Cal. 651.

We have already elsewhere discussed the *Salinas v. Lee* case. The *Ligare* case (supra) precedes considerably in point of time the directly pertinent decisions in *Kahn v. Matthai* and *In re Behymer,* supra. The affidavit therein for the order of publication stated that the *affiant* had made a diligent search, and it reported all affiant had done in the way of search, which was to make inquiry of all persons from whom he could expect to obtain information as to the residence of said defendants. It was held that this was sufficient upon collateral attack. While the evidence offered by the affidavit was meager, it went beyond the mere words of the statute, and it reported the personal

investigation made by the affiant and therefore was not hearsay, as is the affidavit in the case here.

In *Rue v. Quinn,* supra, the affidavit, as in the *Ligare* case, recited an investigation conducted by the affiant himself, to the effect that he had made due and diligent search and inquiry for the defendants by inquiring for each of them of several prominent county officers, naming them and made inquiry of all persons from whom he could expect to obtain information, as to the residences and whereabouts of defendants. This clearly was not a hearsay affidavit, even though information that he might obtain from acquaintances of defendants might be hearsay. In fact the Court stated as to the affidavit,

> "It was shown that the plaintiff was absent from the country wherein the affiant resided and that all of the facts verified *were within the knowledge of the affiant.*" (Emphasis ours.)

In the affidavit in the case at bar, the investigation was carried on in Los Angeles by others than affiant, and affiant merely related what they had written him that they had done. It is just as though he had merely presented the letters without making an affidavit. So it is very clear that *Rue v. Quinn* is not at all in conflict with the cases cited by us, and does not support the contention of appellants herein that the affidavit is sufficient.

Appellants are conscious of the fact that a hearsay affidavit is not a sufficient basis for an order of publication, because on page 38 of their brief they seek to

avoid the hearsay character of the affidavit, by quoting therefrom an outright statement that affiant "and said attorneys" had made a diligent search, etc. But they conveniently overlooked the fact, which we have called to the Court's attention earlier in this brief, that Herrington prefaced that statement in his affidavit by the following:

> "That in view of the foregoing (the hearsay statement of process server Gold) affiant and plaintiffs' attorneys have decided it would be futile to spend further time, effort and money in an attempt to effect personal service of process on said defendant." (R. 56-57.)

ANSWER TO APPELLANTS' POINT THAT "APPELLEE HAS MADE NO PROOF THAT WITH DUE DILIGENCE SHE COULD HAVE BEEN FOUND IN THE STATE OF CALIFORNIA OR THAT SHE DID NOT CONCEAL HERSELF TO AVOID SERVICE OF PROCESS".

(Appellants' Brief, p. 38.)

We do not consider this point worthy of serious reply. This case stands or falls on the sole question of whether the trial Court in the first instance had jurisdiction to issue the order for publication of summons. If the affidavit is insufficient as held in *Kahn v. Matthai* (supra), and *"In re Behymer,"* the order was void and the trial Court very properly set it aside.

Incidentally appellee very definitely declared in her affidavit filed in support of her motion to set aside

the default judgment—that she resided in Los Angeles, never concealed herself and never refused to answer the door bell. (R. 76.)

ANSWER TO APPELLANTS' POINT THAT "(7) A DEFENDANT WHO CONCEALS HERSELF TO AVOID SERVICE IS ESTOPPED FROM CLAIMING DEFECTS IN THE SERVICE BY PUBLICATION."

(Appellants' Brief, p. 39.)

This point of appellants is supported neither in fact nor by appropriate citation. There is no evidence of concealment. The hearsay statements of process server Gold, not made under oath, are certainly not evidence of such a fact. Appellee by her affidavit directly denied the fact. There is no evidence that appellee knew of the pendency of the proceedings.

The question of the sufficiency of the affidavit as a basis for the order of publication, is the only question this Court has to pass on, in this connection.

The three cases cited by appellants, namely, *Boland v. All Persons,* 160 Cal. 486, *Hiltbrand v. Hiltbrand,* 218 Cal. 321, and *Collins v. Streitz,* 47 Ariz. 146, have nothing to do with the point. The two California cases cited relate to applications by defendants regularly and legally served by published summons, for leave to appear under Section 473a of the California Code of Civil Procedure.

We cannot see how they apply here.

APPELLANTS' POINTS III (8) (a) (b) AND (c).
(Appellants' Brief, pp. 40-50.)

In the trial Court appellee raised the point that the order of publication was invalid because among the other reasons hereinbefore mentioned, it failed to direct service by mail to the last known residence of the defendant (appellee). After reading appellants' citation, *Ligare v. California S. R. R. Co.*, 76 Cal. 610, 614, we were convinced that point was not good and so advised the trial judge while the motion was pending before him.

In appellee's motion in the trial Court we included a prayer that the action be dismissed on the grounds that: (1) the Court had no jurisdiction because the liability of appellee to any one of appellants was not of the proper jurisdictional amount and (2) the action was brought in the wrong district because appellee does not reside in this judicial district.

We are not standing on either of those grounds. It therefore becomes unnecessary to answer appellants' arguments upon those points.

IV.

ANSWER TO APPELLANTS' POINT THAT: "THE DISTRICT COURT HAD NO JURISDICTION TO QUASH SERVICE OF SUMMONS AND ITS ORDER TO THAT EFFECT WAS IN ERROR.

(Appellants' Brief, p. 51.)

Appellants here argue that the judgment has become final and the District Court had lost jurisdic-

tion; citing *Bronson v. Schulten* (supra) and *United States v. Mayer* (supra). We believe we have already demonstrated that the default judgment was *void;* that a void judgment never becomes final, and that the trial Court never loses the power to upset it.

Appellants next make the remarkable suggestion that by ordering appellee to file an answer, the trial Court expressed its belief that appellee was properly before the Court, and that quashing service of summons was an idle act.

The order setting aside the default gives defendant (appellee) 30 days from the date in which to answer the complaint herein. The only significance in that fact, as appellants' counsel well know, is that in defendant's closing brief before the trial Court we said:

> "All we are asking here is an opportunity to defend against plaintiffs' complaint. Defendant stands ready to defend against the action if the default judgment is set aside."

V.

ANSWER TO APPELLANTS' POINT THAT "APPELLEE BY MAKING HER MOTION TO DISMISS, BY PLEADING MATTERS CONCERNING THE MERITS OF THE CASE AND THE COURT'S JURISDICTION OF THE SUBJECT MATTER, VOLUNTARILY SUBMITTED HER PERSON TO THE JURISDICTION OF THE DISTRICT COURT AND WAIVED THE RIGHT TO RELY ON THE DEFENSE OF IMPROPER SERVICE."

(Appellants' Brief, p. 51.)

The judgment against appellee based upon the publication of summons was either void or valid. If it is valid, the case at the time of appellee's motion was no longer pending, and any motion to dismiss the proceedings on any ground would have been a futile act. If it is a void judgment it is as though no order of publication was ever signed and the case was still pending when appellee made her motion.

Consequently appellee's prayer for a dismissal of the action on the ground that it was brought in the wrong district, or that the claim thereof was outlawed could not be an admission that the published service upon her was good, but on the contrary would have to be predicated upon the assumption that the default judgment was void and the action was therefore still pending and the complaint still pleadable against.

However the point is set completely at rest, by the *Federal Rules of Civil Procedure. Rule 12(b)* provides:

> "Every defense, in law or fact, to a claim for relief in any pleading, * * * shall be asserted in

> the responsive pleading thereto if one is required, except that the following defenses may *at the option of the pleader* be made by motion: (1) lack of jurisdiction over the subject matter, (2) *lack of jurisdiction over the person,* (3) improper venue, (4) *insufficiency of process,* (5) *insufficiency of service of process,* (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. *No defense or objection is waived by being joined with one or more* other defenses or objections, in a responsive pleading or motion. * * *." (Emphasis ours.)

While the foregoing rule is too clear and definite to require interpretation, we take the liberty of quoting from the decision of a New Jersey District Court, in *Orange Theatre Corp. v. Rayherstz Amusement Corp.,* 2 Fed. Rules Decs. 278, the following pertinent language:

> "The new rules have avoided all distinction between demurrers, motions, exceptions for insufficiency and pleas. Special appearances to challenge jurisdiction over the defendant or that the venue is improper may be pleaded in the answer and the defendant waives nothing by so doing."

Appellants cite three California cases under this head, namely, *Raps v. Raps,* 20 Cal. (2d) 382; *Olcese v. Justice's Court,* 156 Cal. 82, and *Security Loan Co. v. So. Riverside Fruit Co.,* 126 Cal. 418. Those cases are clearly distinguishable from our case, but inasmuch as

the Federal Rules control the situation we shall refrain from a discussion of them.

CONCLUSION.

We believe the sources and precedents cited in this brief establish that the default judgment against appellee and in favor of appellants is absolutely void, and that the trial Court did not err in setting it aside.

Dated, San Francisco,
July 2, 1943.

Respectfully submitted,
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